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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1923.

UNITED LEATHER WORKERS INTERNATIONAL UNION et al.,
Appellants,
vs.
HERKERT & MEISEL TRUNK COMPANY, a Corporation, et al.,
Appellees.

No. [redacted]233

APPELLANTS' REPLY BRIEF.

JOHN P. LEAHY,
Solicitor and Counsel for Appellants.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1923.

UNITED LEATHER WORKERS INTERNATIONAL UNION, LOCAL LODGE OR UNION NO. 66; A. M. REUTER, AL BIRKENMEIER, H. EHLENBECK, CHARLES KAYSING, JOHN SMITH, MICHAEL LITTLE, JOHN LECHNER, CHARLES MORGAN, PAUL BERRY, EDWARD SCHILLING, AMBROSE KINTZ, STEPHEN WILHELM, WALTER DECHANT, ESTHER BRADLEY, NORA WIELAND, MALLEY COLLEY, WALTER FLEHER, THOMAS HALLIBURTON, J. PERRY, JOHN REMSTEDT, CHARLES REUBEN, HENRY SCHNITZ, THEO SUMMERS, CHARLES TADESCO, FRED TENTSCHERT, RAY WATKE, WALTER WEBBER, JOHN ZIMMERMAN, HERMAN DIECKHORNER, JOE KUHN, WM. BALMER, ROBT. GINNER, TOM CAITO, FRANK CATO, RUDOLPH KOOB, ANTON PAULEY, LEO PAULEY, ROBERT WARSING, STEVE ZOELLER, TONY SANSON, ANNIE STECKER, SYLVESTER SCHNITZ, GUS NENNINGER, GEORGE WENK and BENJAMIN SCHNITZ,

Appellants,

vs.

HERKERT & MEISEL TRUNK COMPANY, a Corporation, P. C. MURPHY TRUNK COMPANY, a Corporation, JAMES A. QUIRK TRUNK COMPANY, a Corporation, STABILITY LEATHER GOODS MANUFACTURING COMPANY, a Corporation, and H. A. KOLB TRUNK AND CASE COMPANY, a Corporation,

Appellees.

NO. 878.

APPELLANTS' REPLY BRIEF.

In the statement contained in the brief filed by the appellees the following appears (Appellees' Br., p. 4):

"The facts to which your Honors' attention will be called are limited to those disclosed in

> the opinion of the District Court and that of the Circuit Court of Appeals for the Eighth Circuit."

The attempt to combine both these findings in the statement of the appellees, which so far from being identical essentially differ in important particulars, appears to have resulted (inadvertently no doubt) in the appellees attributing to both courts the following findings (Appellees' Br., p. 6):

> "It was the purpose and intent of the defendants to prevent, if possible, and if not, to restrict, plaintiffs' interstate commerce, and thereby cause plaintiffs loss of income and injury and force plaintiffs to accede to the demands of the defendants."

Now the District Court found that there was a conspiracy upon the part of the defendants to establish a "closed shop," i. e., to unionize the plaintiffs' plants, but it did not find that such conspiracy was directly intended to interfere with or to obstruct the plaintiffs' interstate shipments. An examination of the opinion of the learned Judge of the District Court in this case (which will be found in Appendix A, page 121, of the original brief filed by the appellants, and at page 46 of the transcript of the record) will very clearly indicate this.

The District Court found that the articles which the plaintiffs were manufacturing had not come into

existence at the time of the strike, and the only interference on the part of the defendants was with their manufacture, and after citing the case of In re Green, 52 Fed., l. c. 113; Hammer v. Degenhart, 247 U. S., l. c. 272; Coe v. Errol, 116 U. S. 517 (see page 126 in appellants' original brief and page 49 of the transcript of the record), that Court said:

> "The above well-known and well settled definition, touching when articles made in one state and intended for sale in another, begin their travels towards such other state, so as to bring them within the constitutional power of Congress to regulate interstate commerce, ordinarily would be regarded as conclusive upon the courts in construing the language used in the first section of the Sherman Antitrust Law. **If the matter were one of first impression in this circuit I would feel constrained to agree with counsel for defendants, and to hold that the above well-settled definition touching when interstate commerce begins ought to be applied to that term as used in the Sherman Antitrust Act, supra.** But the matter is not one of first impression in this circuit. Therefore, **it is my duty, regardless of any personal views or convictions which I may hold upon the subject,** to defer to and follow what I am forced to consider the view taken by the Court of Appeals of the Eighth Circuit."

And again the learned District Judge, after citing the opinion of the Circuit Court of Appeals of the

Eighth Circuit in the case of Dowd v. United Mine Workers of America, 258 Fed. Rep. 829, and that the appellate court in the Dowd case, supra, notwithstanding that the coal, or much of it in that case, intended for interstate commerce had not been mined and was not in existence as a commodity of any sort of commerce or transportation, but because the mining of same was prevented by the acts of the defendants, held that the plaintiffs were by reason of these facts engaged in interstate commerce, applied that ruling—although opposed to his own opinion—to the facts in the instant case, and also emphasized his personal view of the opinion in the Dowd case and the Coronado Coal Company case, 258 Fed. Rep. 829, in the following language (see page 230 of appellants' original brief and page 52 of transcript of record):

> "**I am constrained, regardless of my own views,** to hold that the plaintiffs here were engaged in interstate commerce, and that the acts of defendants operated as restraints upon that commerce within the purview of the first section of the Sherman Antitrust Act."

The appellees in their argument assert (Appellees' Br., p. 8) that:

> "The pleading and proof disclose a quite common succession of events in labor disputes.
>
> "First. The defendants formed the purpose of

completely unionizing the factories of the plaintiffs.

"Second. They attempted to accomplish this purpose by negotiations with plaintiffs. In this they failed.

"Third. They conspired together to destroy the business of plaintiffs until such time as plaintiffs would consent to the unionization of their factories."

They concede that the first, i. e., the purpose to unionize the plaintiffs' plants was a lawful one, and that the second, to accomplish this purpose by negotiations with plaintiffs, was also a lawful one, but that the third, i. e., that defendants conspired together to destroy the business of the plaintiffs until such time as the plaintiffs would consent to the unionization of their factories is complained of by them as violative of the Sherman Anti-Trust Act, and they emphasized their view of the theory of their case in the following language:

"It is essential that the precise objects of the conspiracy complained of be kept in mind. This is so because, **unless the conspiracy and the acts done in pursuance of it, have a DIRECT RELATION to interstate commerce, the District Court had no jurisdiction of the suit**" (Appellees' Br., p 9).

Now, upon the theory of the appellees as clearly indicated in their bill of complaint and in the evi-

dence by which they sought to establish the allegations of same, the precise object of the conspiracy alleged to exist upon the part of the defendants was

"to unionize the factories of the plaintiffs,"

and this purpose of the defendants—of the existence of which there was not one scintilla of evidence in the entire case—is now admitted by the appellees to have been a lawful one, **for such purpose or object had no direct relation to interstate commerce.** And even if there was an unlawful interference with the production of the plaintiffs' goods in their factories on the part of the defendants and a consequent inability of the plaintiffs to fill the interstate orders which they had received and ship their manufactured products in interstate commerce, such interference was not the direct object of the conspiracy and had no direct relation to interstate commerce, but was merely incidental to the same and therefore not within the scope of the Sherman Anti-Trust Act, for that act condemns only these combinations or conspiracies that are formed to restrain trade and commerce amongst the several states, and such a conspiracy was neither pleaded or proved in the instant case.

The weakness of the plaintiffs' case is practically admitted by the able counsel for appellees in their adroit attempt to eliminate the positive averments in

their bill of complaint that the objects of the conspiracy alleged to exist upon the part of the defendants was to unionize the business of the plaintiffs unless the demands of the defendants were granted, namely, to establish union shops, and which was the basis of their case as submitted to the trial court, and they now attempt to describe these positive and essential averments as

> "mere recitals of a situation which existed prior to the time the unlawful conspiracy was formed, but as antedating the conspiracy."

We make no objection to the appellees negativing the positive allegations of their bill, and, indeed, upon which that bill was based, but we do object to their attempt to inject into their pleadings the allegations of a conspiracy to interfere with the plaintiffs' interstate commerce which was neither pleaded nor proved.

We shall now discuss, briefly, the cases relied upon by the appellees and mentioned in their brief.

WASHINGTON SECURITIES COMPANY v. UNITED STATES, 234 U. S. 576.

We concede that the rule is well settled that findings of fact concurred in by two lower courts will not be disturbed by this Court unless shown to be clearly erroneous, but we submit that this rule has no appli-

cation to the instant case, because there was no concurrence of the two lower courts in the findings of facts and because we are dealing in this case with conclusions of law as applied to the facts. Moreover, these findings as to the existence of the conspiracy are, as we submit, clearly erroneous.

EASTERN STATES RETAIL LUMBER DEALERS ASSOCIATION v. UNITED STATES, 234 U. S. 600, 609.

In the above case the defendant was a combination of various lumber dealers in different states, which combination was charged with having entered into a conspiracy to unduly restrain competition. The question of jurisdiction was neither involved nor considered there.

NORTHERN SECURITIES COMPANY v. UNITED STATES, 193 U. S. 197, 337.

In the above case, cited by the appellees in their brief, the question involved was compressed by Mr. Justice Harlan, speaking for the Court, into the following statement:

> "What the Government particularly complains of—indeed, all that it complains of here—is the existence of a combination among the stockholders of competing railroad companies which, in violation of the Act of Commerce restrains

> interstate and international commerce through the agency of a common corporate trustee **designated to act for both companies repressing free competition between them.**"

And at page 354 the learned Justice, after stating that the actual nature of the transaction was only to organize the Northern Securities Company as a holding company in whose hands not as a real purchaser or absolute owner but simply as a custodian were to be placed the stocks of the company, such custodian to represent the combination for and between the stockholders of the constituent companies, said:

> "**The direct and necessary effect** of such combination being to restrain and monopolize interstate commerce by suppressing or smothering competition between the lines of two railway companies."

And the use of the term "necessary effect" was not meant, as we respectfully suggest and submit, to have a general application to all cases wherein interstate commerce was in any manner affected, but only applied and had special reference to the facts of that case where the Court found as intimated—a **plainly indicated intent** to restrain competition and thus to directly interfere with and restrain interstate commerce.

And to make this distinction more clear in its application to the present case, in the Northern Securities case, supra, the Court found that the plainly indicated intent and object of the conspiracy was to destroy competition and thus to interfere with interstate commerce, but here the theory of plaintiffs' case and the theory upon which they relied and upon which the case was tried was that the direct object and purpose of the defendants—as charged by the plaintiffs—was to unionize the plaintiffs' plants, and if this be so and even if there was interference, such interference with interstate commerce, not being the direct purpose of the conspiracy, was merely incidental, and did not give the federal court jurisdiction herein.

And in that case, too, Mr. Justice Harlan, after expressly approving the doctrine of the case of United States v. E. C. Knight Company, 156 U. S. 1, l. c. 331, and after stating that the Anti-Trust Act embraced and declared to be illegal every contract, combination or conspiracy which directly or necessarily operates in restraint of trade or commerce among the several states or with foreign nations distinctly held that the scope of the act should not be extended to manufacture or production in the following language:

> "It had no reference to the mere manufacture or production of articles or commodities within the limits of the several states."

UNITED STATES v. REDDING COMPANY, 226 U. S. 324.

The above case also cited by the appellees in their brief is not in point here, for there the question considered was not local sales of coal, but this Court held:

> "The general market contemplated was at tide-water and the sales were made upon the basis of the average price at tide-water,"

and that the purpose of the combination was to control and to dominate trade and commerce in other states for an illegal purpose, and in referring to the case of Interstate Commerce Commission v. Baird, 194 U. S. 25, l. c. 42, this Court said:

> "The conceded plan concerned the relations of these railroads to interstate commerce and **directly** affected the transportation, sale and price of the coal in other states." (See p. 364.)

Here plainly the direct object and purpose of the conspiracy found by the Court to exist was to obtain the complete control of the interstate traffic in the coal and this view is more particularly emphasized by the language that follows the foregoing declaration:

> "The prime object in engaging in this scheme was not so much **the control and sale of coal in**

Pennsylvania, but the control of sales in New York harbor.''

The object of the conspiracy in the Reading case, supra, was therefore, as found by the Court, to **directly** interfere with and unlawfully control the interstate commerce in coal, and the acts that followed it were plainly in furtherance and intimately connected with that purpose and design. The absorption of the stock of the collieries mentioned by the Temple Company, which the Court found to be a mere holding company, was declared to be part and the principal part of the common design.

The deduction made by the appellees from the opinion in the Reading case, supra, that the Sherman Act will reach any act, however remote such act (standing alone) may be from interstate commerce, if that act is made an effective part of a combination to restrict such commerce, cannot apply to the instant case, nor to any case which lacks actual proof of the existence of a conspiracy, the direct object of which is to unequivocally and unlawfully restrain interstate commerce, when, if that be proved, then every act done in pursuance of the conspiracy would constitute such an interference. But in the instant case, as we have already pointed out in the original brief and this brief, such a conspiracy for the direct object and purpose of unlawfully obstructing the

plaintiff's interstate commerce was neither pleaded nor proved, for the dispute was purely local, relating to terms and conditions of employment, and the effect on interstate commerce was not direct but incidental to the purpose of the alleged conspiracy.

AMERICAN COLUMN COMPANY v. UNITED STATES, 257 U. S. 377.

In the above case, also cited by the appellees in their brief, the bill not only alleged that the plan of the 400 members of the American Hardwood Manufacturers' Association constituted a combination and conspiracy to restrain interstate commerce in hardwood lumber by restricting competition and increasing prices, in violation of the Anti-Trust Act, but the Court found that the evidence established that the purpose and effect of the plan was to restrict competition and restrain interstate commerce. The theory upon which the above case was submitted to the Court is outlined by the Solicitor General on behalf of the Government in his brief, where, after citing the case of Hopkins v. United States, 171 U. S. 578, relied upon by the defendants and in which it was held that the Anti-Trust Act did not apply because interstate commerce was not directly involved, it was contended:

> "**These cases have no special bearing here,** because there is no question but that the appel-

lants' lumber was moving in interstate commerce.

"There is necessarily a distinction between agreements which by their nature **are local in their operation and but incidentally affect** interstate commerce, and those agreements which directly pertain to such commerce and are not local in their nature." (See page 300.)

DUPLEX PRINTING PRESS COMPANY v. DEERING, 254 U. S. 443.

Nor is the above case, cited by the appellees in their brief, in point here, for the jurisdiction of the federal court was not involved or questioned in that case, but invoked by reason of adverse citizenship and concerned the legality of what is known as the secondary boycott, but we find that one of the distinguished counsel who represented the appellants in the Duplex case, supra, contended for the point which we are trying to establish here by drawing a crisp and clear distinction between the mere local strike and a boycott by outsiders, as was the case in the Duplex case, supra. (See page 440.)

LAMAR v. UNITED STATES, 260 Fed. 561.

In the above case, also cited by the appellees in their brief, it was held that the intent of the conspirators was to foment a strike and stop manufacture

and transportation and that the object was not to call the strike but to restrain or suppress foreign trade, and emphasizing this view the Circuit Court of Appeals for the Second Circuit said:

> "Where it is proved (as here) that the proposed instigation of strikes bore no relation whatever to the welfare of the strikers, then at most and best the strike becomes nothing more than an instrument legal in itself, but used only for an illegal end."
>
> "The end or object of the proven conspiracy was not to call strikes, but **to restrain or rather to suppress foreign trade.**"

UNITED STATES v. WORKINGMEN'S COUNCIL, 54 Fed. 994.

This is the only citation from the federal reports in appellees' brief which appears to us to apply to the instant case, and there the basis of the finding of the Court was that:

> "Not only was the flow of commerce through the City of New Orleans purposely arrested, but even the transportation of the goods and merchandise from the permanent whereabouts to the landings was forcibly stopped."

But, as the facts show, [redacted] in this case, no such interference was made or offered.

OLIVER IRON COMPANY v. LORD,
262 U. S. 172, l. c. 178.

We find that the doctrine which we have been contending for was never more strongly emphasized than in the above case, where the suit was to restrain the enforcement of a taxing act adopted by the State of Minnesota, and this Court said (page 178):

> "Mining is not interstate commerce, **but like manufacturing** is a local business subject to local regulation and taxation."

Citing:

> Kidd v. Pearson, 128 U. S. 1, 20;
> United Mine Workers v. Coronado Coal Company, 259 U. S. 344.

And disposing of the precise jurisdictional point involved in the instant case, namely, that some of the articles to be manufactured were after that process was completed to be shipped in interstate commerce, this Court said:

> "Its character in this regard is intrinsic, is **not affected by the intended use or disposal of the product, is not controlled by contractual engagement** and persists, even though the business be conducted in close connection with interstate commerce."

CONCLUSION.

In conclusion we submit to the Court that the following are the admitted facts in this case:

(1) That the plaintiffs are Missouri corporations and the defendants are residents of the same state. There is no question, therefore, of diverse citizenship.

(2) That there was no interference whatever on the part of the defendants or other persons with the importation of raw material or the exportation of manufactured products from the factories of the plaintiffs.

(3) That the object and purpose of the conspiracy charged against the defendants in the complainants' bill was not to directly restrain or interfere with interstate commerce of the plaintiffs, but to unionize the plaintiffs' shops, and such interference was merely incidental to that purpose.

(4) That no direct purpose to interfere with the plaintiffs' interstate commerce could be reasonably implied from any acts of the defendants and no knowledge of the nature or the extent of such contracts was ever brought home to them.

(5) That all of the defendants with the exception of Birkenmeier were employes of the plaintiffs and all members of the local union in question; that their

contracts had expired; that they entered into negotiations for the renewal of these contracts with the plaintiffs under the plan of collective bargaining, and the failure to arrive at an understanding is not charged or proved to have been the fault of the defendants.

(6) That the conspiracy charged against the defendants, namely, to unionize the plaintiffs' plants, even if proved—which we deny—was a lawful one in which they were within their legal rights in entering into.

(7) That the defendants, on the failure of the negotiations above mentioned, peacefully withdrew from the plaintiffs' employment, and that as they had an undoubted right to do, and that this and this alone prevented the plaintiffs from manufacturing the raw material which remained in their hands.

We again submit that the learned majority opinion of the Court of Appeals in this case is clearly erroneous, and respectfully ask that the judgment be reversed.

Respectfully submitted,

JOHN P. LEAHY,
Solicitor and Counsel for Appellants.